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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PEDRO SANCHEZ ESTRADA,

Defendant and Appellant.

D039914

(Super. Ct. No. SCD145319)

APPEAL from a judgment of the Superior Court of San Diego County, Norbert Ehrenfreund, Judith F. Hayes, Richard J. Hanscom, Bernard E. Revak and Howard H. Shore, Judges. Affirmed.

Pedro Sanchez Estrada was convicted of conspiracy, offering to sell a controlled substance and possession of a controlled substance for sale. It was found true that the controlled substance exceeded 10 kilograms in weight within the meaning of Health and Safety Code section 11370.4, subdivision (b)(3). Estrada was sentenced to a term of 13 years in prison. He appeals, arguing the trial court erred in denying his request for a

substitution of counsel and in failing to require that the prosecution reveal the identity of its confidential informants.

FACTS

A. Prosecution Case

Patrick Montalvo was a paid informant. On May 24, 1999, as part of a buy operation, agents arranged for a confidential informant (CI) to introduce Montalvo to appellant so he could negotiate the purchase of a large quantity of methamphetamine. To that end the CI and his brother met appellant in front of a Denny's restaurant in San Ysidro. Montalvo was equipped with a transmitter to allow the conversation to be heard and recorded by the officers. Watched by narcotics agents, Montalvo contacted appellant and the other men at the restaurant. Speaking in a code that avoided the direct mention of drugs, the CI told appellant Montalvo wished to purchase methamphetamine. Appellant, also never directly mentioning drugs, stated he had 27 or 28 pounds. Montalvo stated he had enough money to buy 20 pounds and asked to see the contraband. Appellant agreed to sell Montalvo the methamphetamine for \$6,000 a pound. Appellant got into Montalvo's vehicle and directed him to a house in Spring Valley.

When the men arrived at the house, appellant took Montalvo to the backyard where they were met by Jose Luis Robles and Arnoldo Gonzalez Moreno. Robles or Moreno went into a shed and returned with a bag containing material in the form of bricks. Appellant and Montalvo went into the house. Montalvo inspected the material and stated he would purchase the drugs.

It was agreed that appellant would go with Montalvo to get the money. Montalvo signaled to the agents that there were drugs at the house. Appellant and Montalvo stopped at a convenience store and appellant was arrested. The agents obtained a warrant, returned to the house and found 27 pounds of methamphetamine. The street value of the methamphetamine was almost half a million dollars.

The tape recording of the Spanish language conversation was translated for the jury.

B. Defense Case

Appellant was born in Mexico and immigrated to the United States in 1988. At the time of his arrest, appellant was living in Tijuana and ran a currency exchange business.

Appellant had known Moreno for many years. On several occasions after appellant moved to Tijuana, Moreno loaned appellant his pick-up truck for use in the United States. On May 24, 1999, appellant borrowed Gonzalez's truck to run errands. Gonzalez asked appellant to first go to a motel in San Ysidro, pick up two people and bring them to the house in Spring Valley. Appellant did not know why Gonzalez wanted the people picked up.

When appellant arrived at the motel, he saw someone in a Denny's restaurant waving at him. Appellant went into the restaurant and told the man he was there to pick him up. The man stated his friend would arrive soon and asked appellant to sit down. A second man arrived. The three men talked about appellant using a tea called tetohuxtle to recover from a disease. They talked about where the tea could be purchased, how it was

packaged and that it could be bought for \$20 in drug stores near San Ysidro. Appellant wanted to leave but the men insisted he wait for a third man. After calling Moreno, appellant agreed to wait.

After a time the third man, Montalvo, arrived. Montalvo stated he would drive to the house if Gonzalez would show him the way. He would return appellant to the truck in San Ysidro after the meeting. In his testimony appellant denied making certain statements reflected in the transcript of the conversation offered by the prosecution. He complained that some of the translations were incorrect and that the tape had been altered.

As the men drove, appellant talked about the tea that cured his illness. Appellant told Montalvo he would bring him tea from Tijuana. Montalvo talked about drugs but appellant avoided the subject.

When the men arrived at the house in Spring Valley, Moreno and Montalvo greeted one another. Appellant did not participate in their conversation or in any part of the transaction and denied making statements attributed to him in the translation of the conversation.

Francisco Corona and Fernando Ocegaera had known appellant for a long time, stated he had a good reputation and were not aware of him ever selling drugs.

DISCUSSION

A. Substitution of Counsel

Appellant argues the trial court abused its discretion when it repeatedly denied his motions to substitute defense counsel Charles Guthrie.

1. Law

"A defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. [Citations.]" (*People v. Jones* (2003) 29 Cal.4th 1229, 1244-1245.)

Disagreements between counsel and client concerning matters of tactics are alone insufficient to show an irreconcilable conflict. The trial court is not required to conclude an irreconcilable conflict exists if the defendant has not made a sustained good faith effort to work out any disagreements with counsel and has not given counsel a fair opportunity to demonstrate trustworthiness. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1086, 1092.) A defendant's claimed lack of trust in, or inability to get along with, an appointed attorney is alone insufficient to compel appointment of substitute counsel. If this were not the case, defendants effectively would have a veto power over any appointment and by a process of elimination could obtain appointment of their preferred attorneys. (*People v. Jones, supra*, 29 Cal.4th at pp. 1245-1246.)

We review a trial court's decision declining to relieve appointed counsel under the deferential abuse of discretion standard. (*People v. Jones, supra*, 29 Cal.4th at pp. 1245-1246.)

2. Background

In the trial court appellant had six *Marsden* hearings held before four different judges. In the proceedings below seven different lawyers represented appellant at one time or another. The first three were retained. Appellant relieved the first after the

preliminary hearing; appellant relieved the second within a month. The third represented appellant during his entry of a guilty plea. Within a month of his plea, appellant complained to the trial court that his attorney was not interested in his case and had stopped working on the matter since appellant was unable to pay him.

That attorney was relieved and the court appointed appellant another attorney. Appellant then moved to withdraw his plea of guilty. Although his motion was granted, appellant complained his attorney was not effectively representing him, he had no rapport with counsel and was not being allowed to meaningfully participate in his defense. Counsel was relieved and Charles Guthrie was appointed to represent appellant.

Appellant was soon complaining about Mr. Guthrie's representation. Appellant stated Guthrie had lied to him, was not effectively investigating his case and did not allow appellant to participate meaningfully in his defense. On November 27, 2000, the trial court conducted the first of appellant's six *Marsden* hearings. At the hearing appellant complained about a lack of communication with counsel and that he had not been provided materials that would help him contribute to his defense. Counsel contradicted appellant's assertions. The motion to substitute counsel was denied.

Over the next seven months, appellant repeatedly complained about Mr. Guthrie's representation. Four *Marsden* hearings were conducted during that period to consider those complaints and appellant's request for new counsel. The theme of appellant's complaints remained generally the same from hearing to hearing. Appellant commented on claimed problems with his earlier attorneys. He stated Mr. Guthrie was not following up on evidence and leads provided by appellant, that counsel did not seem to understand

his case, did not communicate with appellant, refused to present the case in the manner appellant wished and was not prepared for trial. Appellant complained counsel made motions without appellant's knowledge and consent and that counsel did not provide him with all the documentation in the case. In many instances appellant's claims were difficult to follow and lacked specifics.

Counsel's replies in the hearings were also generally the same. He stated he had some difficulty in understanding appellant's specific concerns. Counsel stated he had met with appellant on several occasions and had an investigator who was also working on the case. Counsel noted he had made several pretrial motions and that when those motions were denied he filed a petition for a writ in the Court of Appeal. He believed he had done all he could do to prepare for the case. He had followed through on witnesses appellant believed would be helpful to him. It appeared those witnesses either would assert their Fifth Amendment rights and refuse to testify or their testimony would be inadmissible for evidentiary reasons. Counsel stated he had used his own money in preparing the case.

While four different judges heard the Marsden hearings, the reasons stated for denying substitution were similar. Judge Hanscom concluded that part of the problem was that appellant simply did not understand the judicial process. Judge Hayes, who heard the last two *Marsden* hearings concerning Mr. Guthrie, expressed some concern that appellant's repeated *Marsden* motions might be an attempt to manipulate the process. She stated it was often difficult to understand appellant's complaints. She concluded in any event that appellant had not made any showing justifying a change of counsel. She stated that counsel had spent a great deal of time on the case and had carefully reviewed

the case with appellant. Judge Hayes found that when pressed to give specifics about his complaints, appellant was unable to do so. In many instances counsel contradicted appellant's account of events. The court concluded Guthrie was an excellent attorney, was prepared to go trial and denied the motion to substitute counsel.

After appellant was found guilty, Tom Lavaut was appointed to replace Guthrie as counsel. Several months later appellant asked that Lavaut be replaced and that he be granted new counsel. Appellant stated he was having the same problems with Lavaut he had with Guthrie. At a sixth *Marsden* hearing appellant complained he had tried to explain his defense to his lawyers but they would not listen. With regard to Lavaut, appellant stated he had never had a relationship with him and that he would not pay attention to appellant.

Lavaut stated he had talked with appellant on several occasions. The problem was that appellant did not understand that he was not going to be able to retry the case. Out of an abundance of caution the trial court appointed appellant a new attorney who represented appellant during the motion for new trial and sentencing.

3. Discussion

The court did not abuse its discretion when on five occasions it denied appellant's motions to relieve Mr. Guthrie. It is clear appellant had difficulty working with most of his lawyers. It appears appellant is uncomfortable with or does not understand the role of counsel in litigation. Although appellant's complaints were often unclear and lacked specifics, it appears he had a particular approach to the preparation and presentation of his case and became frustrated and eventually angry when counsel would not proceed in

the manner he, appellant, desired. A defendant obviously cannot be allowed to repeatedly substitute counsel until he finds an attorney who will act exactly as he or she requires. There was no showing here that Mr. Guthrie was providing appellant ineffective assistance or that any cognizable irreconcilable conflict existed between counsel and client.

B. Confidential Informant

Appellant argues the trial court erred when it failed to require the prosecution to reveal the identity of two confidential informants.

1. Background

By written motion filed July 5, 2000, appellant requested that the prosecution be required to reveal the identity of the government informants he met at the Denny's restaurant in San Ysidro.

A hearing was held on the motion on July 19, 2000. Appellant noted he was charged with conspiracy to sell drugs. He argued he went to the Denny's restaurant to pick up individuals not knowing they were involved in a drug deal. Two confidential informants were involved. CI1 was with appellant for some time at the restaurant. CI2 arrived later. Appellant and the two men talked. CI1 departed and CI2 and appellant continue talking. Appellant indicated the conversation was recorded but it was still in the process of being translated. Appellant and CI2 then drove to a residence in Spring Valley. Their conversation continued in the car. A sale of methamphetamine occurred at the house between CI2 and two men at the residence.

Appellant argued that because CI1 and CI2 were involved in what the People were claiming was a conspiracy to sell drugs, they were percipient witnesses to any role appellant had in that transaction and he was entitled to their identities. The prosecutor agreed that CI2 was a percipient witness to appellant's involvement in the crime, would be called as a witness and the prosecutor was prepared to reveal his identity. As to CI1 the prosecutor stated he was with appellant at Denny's for only approximately five minutes. A Spanish speaking Border Patrol agent observed CI1's interaction with appellant. It was not clear exactly what the men said. The prosecutor stated in the final analysis CI1 might or might not have had a conversation with appellant about drugs. He asked that any order requiring the disclosure of CI1's identity be deferred.

The trial court ordered the prosecution to reveal the identity of CI2. As to CI1 the court found an insufficient showing of materiality at that time and denied appellant's request for the identity of the informant. The court stated the issue could be revisited if necessary.

On September 13, 2000, appellant by written motion renewed his request for the identity of CI1. Appellant noted that he had an unrecorded conversation with CI1 at the Denny's restaurant before the arrival of CI2. Appellant again stated that he was sent to the Denny's restaurant to pick up individuals but did not know he was involved in a drug transaction. CI2 was "wired" and a tape recording was made of his conversation with appellant. Appellant noted the tape had been translated and contained statements made by CI1. The tape recording was not of high quality and did not unequivocally demonstrate that drugs were discussed. Appellant also noted that he had conversed with

CI1 before CI2 arrived and there was no tape of that conversation. Appellant argued CI1 could help him establish his defense by testifying that his conversation with appellant did not involve a discussion of drugs.

On September 27, 2000, a hearing was held on the motion. After an in camera hearing with an agent involved in the investigation, the trial court denied the motion to reveal the identity of CI1.

On April 23, 2001, by written motion appellant again renewed his discovery request. On May 23, 2001, a hearing was held on the motion. Appellant stated discovery revealed there was a third confidential informant present at the Denny's restaurant (CI3). Appellant testified at the hearing and stated that CI3 was present before CI2 arrived and that in his unrecorded conversation with CI1 and CI3 appellant did not mention drugs. An in camera hearing was held on May 23 and 30, 2001. At that hearing a federal agent involved in the investigation leading to appellant's arrest testified concerning CI1 and CIA's part in the transaction.

The motion that CI1 and CI3's identities be revealed was denied.

2. Law

Evidence Code section 1042, subdivision (c), sets out the general rule: Disclosure of a confidential informant's identity is required when the informant is a "material witness" to the guilt or innocence of the accused and nondisclosure would deprive the defendant of a fair trial. (Evid. Code, § 1042, subd. (c); *People v. Hobbs* (1994) 7 Cal.4th 948, 959.) Appellant satisfies his burden of proving the confidential informant is a material witness by "demonstrat[ing] [to] a reasonable *possibility* . . . the anonymous

informant . . . could give evidence on the issue of guilt which *might* result in [appellant's] exoneration." (*People v. Alderrou* (1987) 191 Cal. App.3d 1074, 1080.)

Generally speaking, if the defendant seeks an informant's identity on the ground that the informant is a material witness on the issue of guilt, the trial court must hold an evidentiary hearing. (Evid. Code, § 1042, subd. (d).) If an authorized person claims the privilege to refuse to disclose the identity of the informant, and if the prosecutor so requests, the trial court must hold an in camera hearing in which the prosecutor may attend, but defendant and his counsel may not. (*Ibid.*) Based on the evidence at the in camera hearing, the trial court must determine whether "there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial." (*Ibid.*) If the court determines in camera there is no reasonable possibility that the confidential informant is a material witness to defendant's guilt or innocence such that nondisclosure of the informant's identity would deprive defendant of a fair trial, it does not order disclosure but simply reports its finding. (See *People v Hobbs, supra*, 7 Cal.4th at p. 974.)

We review the denial of the motion for abuse of discretion. (*People v. Ashmus* (1991) 54 Cal.3d 932, 979-980.)

3. Discussion

We have reviewed the transcripts of the in camera hearings and conclude the trial court did not abuse its discretion in refusing to require that the prosecution reveal the identity of CI1 and CI3.

There is no reasonable possibility the CI's could give evidence on the issue of guilt that might result in appellant's exoneration. The prosecution admitted at the in camera

hearings that appellant and the informants did not discuss drugs during the short period before CI2's arrival and the recording of the conversation. CI1 stated appellant wanted to discuss the drug transaction—presumably in the same coded manner he discussed it with CI2—but CI1 told him to wait. Under the circumstances testimony that appellant and CI1 did not discuss drugs would not reasonably have assisted appellant's case.

Neither is it significant that CI1 and CI3 were witnesses to the conversation between appellant and CI2. While it is true that the tape recording of the conversation left much to be desired, it is still, in the context of the entire transaction, highly incriminating. The tape reveals appellant was clearly negotiating a transaction, and even if the word methamphetamine was never used, it is clear the transaction concerned drugs. CI1 and CI3 believed they were conducting a drug buy. It is highly unlikely they would testify in any manner helpful to appellant.

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

McINTYRE, J.

O'ROURKE, J.